111 (2)

No. 08-306

Supreme Court, U.S.
FILED
NOV 7 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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INTRODUCTION

For the fifth time, Petitioner Lisa Miller has submitted to this Court a petition for a writ of certiorari regarding her custody dispute with Respondent Janet Jenkins. The Court rejected all previous petitions: the Clerk rejected the filing of one of the previous four as improperly seeking review from a state intermediate court; the Court denied the other three petitions. Respondent respectfully submits that this petition should meet the same fate, both because of what the petition is, an attack on Virginia's procedural rules, and what it is not, a compelling or even legitimate argument for review by this Court.

The petition is an assault on Virginia's right to enforce a basic procedural rule that one who loses an argument in a matter that becomes final due to procedural default cannot resurrect that argument in the same or subsequent litigation between the same parties. Here, the ruling of the Virginia Supreme Court from which Petitioner seeks certiorari holds that Petitioner is bound by the Virginia Court of Appeals' decision in *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006), App. 27a-48a[1] ("*Miller-Jenkins I*"), which Petitioner failed to appeal properly. This Court has been clear that it will honor regular state rules of procedure and refuse to provide a forum when the petitioner has procedurally defaulted in state court.

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[1] All "App." references are to the Appendix to this Petition for Writ of Certiorari, filed September 4, 2008, unless otherwise indicated.

What is completely absent from the Petition is any reason why this Court's involvement would be necessary to resolve the substantive issue decided in *Miller-Jenkins I*, even if such review were procedurally proper. That decision held that the Parental Kidnapping and Prevention Act (28 U.S.C. § 1738A, the "PKPA") required Virginia to respect Vermont custody orders because proceedings began in Vermont, irrespective of public policy arguments or the Defense of Marriage Act (28 U.S.C. § 1738C, "DOMA"). Petitioner fails to cite any case with a contrary holding, and indeed the case law is unanimous that (1) the PKPA does not permit a state to invoke public policy to ignore the statute's terms; and (2) DOMA is not implicated in the absence of a marriage. No marriage is involved here. Because review by this Court would be procedurally improper and substantively unnecessary, Respondent submits that the petition for certiorari should be denied.

STATEMENT OF THE CASE

This case began in November 2003, when Petitioner Lisa Miller-Jenkins ("Lisa"), filed a complaint in the Rutland County Family Court in Vermont ("Vermont Court"), to dissolve her Vermont civil union with Respondent Janet Miller-Jenkins ("Janet"), and to adjudicate the parental rights and responsibilities over the couple's child, IMJ. In June 2004, the Vermont Court issued a Temporary Custody Order granting Lisa primary physical custody over IMJ and granting Janet visitation rights. The Vermont Court continued to exercise its jurisdiction over the custody and visitation issues and ultimately determined that both Janet and Lisa were legal parents of IMJ, and that Lisa was in

contempt of court for refusing to allow Janet visitation with the couple's daughter. On August 4, 2006, a unanimous Vermont Supreme Court affirmed the Vermont Court's orders. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007). From that decision, Lisa sought a writ of certiorari from this Court, which was denied on April 30, 2007. *Id.*

First Appeal in Virginia. Rather than comply with the June 2004 order of the Vermont Court awarding Janet visitation rights, Lisa filed a new action in the Frederick County Circuit Court in Virginia ("Circuit Court"), asking that court to rule that she was the sole parent and the only person with custodial and other parental rights over IMJ. On October 15, 2004, the Circuit Court dismissed out of hand Janet's jurisdictional objections under the PKPA, 28 U.S.C. § 1738A, and, under Virginia law, ruled that Lisa was the only parent of IMJ and that neither Janet "nor any other person has any claims of parentage or visitation rights over [IMJ]." *See* App. 27a of the Petition For Writ of Certiorari, November 19, 2007.

Janet appealed that decision and, on November 28, 2006, the intermediate Court of Appeals of Virginia ("Court of Appeals") unanimously reversed the Circuit Court's assumption of jurisdiction in the case, holding that Vermont had sole jurisdiction over the case pursuant to controlling federal law. In a comprehensive, published opinion, the Court of Appeals held that, under the PKPA, "the [Virginia] trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and

visitation orders of the Vermont court." *Miller-Jenkins I*, 49 Va. App. at 98, 637 S.E.2d at 335, App. 39a. The Court of Appeals also directed the Circuit Court "to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id.* at 103, 637 S.E.2d at 338, App. 47a.[2] On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing *en banc*. *See* App. 57a of the Petition For Writ of Certiorari, November 19, 2007. Lisa sought to appeal to the Supreme Court of Virginia, but was informed by the Clerk of the court that her appeal was procedurally improper. Lisa then submitted a petition for certiorari to this Court, which the Clerk of this Court returned without filing because the challenged decision was not from the state's highest court. The Virginia Supreme Court dismissed Lisa's appeal on May 7, 2007, for her failure file a Notice of Appeal as required by the Rules of the Supreme Court of Virginia. *See* App. 20a of the Petition For Writ of Certiorari, November 19, 2007. Lisa again submitted a petition of certiorari to this Court, substantively identical to this Petition, except for her attempt to have this Court ignore her procedural default. *Compare* Petition for Writ of Certiorari, November 19, 2007, at 1 n.1 with Petition for Writ of Certiorari (September 4, 2008) at 32-36. This Court denied certiorari on January 22, 2008.

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[2] Like the Virginia Court of Appeals, a unanimous Supreme Court of Vermont has also concluded that, under the PKPA, Vermont has sole and continuing jurisdiction over this custody matter – a decision this Court already has declined to review. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007).

Second Appeal in Virginia. While the Virginia Court of Appeals was considering the First Appeal, Janet sought to register the Vermont custody order in the Frederick County Juvenile and Domestic Relations Court ("J&DR Court"). The J&DR Court registered the order, but on March 1, 2006, the Circuit Court reversed. Janet appealed and, on April 17, 2007, in a two-page, unpublished opinion, a unanimous panel of the Court of Appeals reversed the Circuit Court's refusal to register the Vermont custody order, finding that this result was mandated by the Court of Appeals' prior decision:

> "[i]n light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case, Record No. 0688-06-4. Accordingly, we likewise vacate the trial court's March 1, 2006 order and remand the case to the trial court with instruction to enter an order allowing Janet Miller-Jenkins to register the Vermont order in Virginia."

See App. 16a.

Lisa timely appealed that decision to the Virginia Supreme Court, which unanimously held that Lisa was barred from attempting to relitigate the issues decided against her in *Miller-Jenkins I*. *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 661 S.E.2d 822 (2008), App. 1a-13a ("*Miller-Jenkins II*").

REASONS FOR DENYING THE PETITION

I. Because the Decision Below Rested on an Independent and Adequate State Procedural Ground, the Petition Should Be Dismissed.

As the Virginia Supreme Court held, and as a comparison of the certiorari petitions reveals, every substantive issue Lisa raises in her Petition in this case was decided by the Virginia Court of Appeals in *Miller-Jenkins I*. *Miller-Jenkins II*, 276 Va. at 27, 661 S.E.2d at 827, App. 11a ("We agree with the Court of Appeals' conclusion that each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal."). *Miller-Jenkins I* determined that Vermont had jurisdiction over the dispute under the PKPA, notwithstanding DOMA or the Virginia Marriage Affirmation Act. 49 Va. App. at 102, 637 S.E.2d at 337, App. 44a-45a. Lisa failed to perfect her appeal in *Miller-Jenkins I* to the Virginia Supreme Court, and the Court of Appeals decision became final. 276 Va. at 24, 661 S.E.2d at 825, App. 5a; *Id.* at 29, 661 S.E.2d at 827, App. 13a (Hassell, J., concurring) (Lisa "failed to perfect an appeal from that decision in the manner required by law."). In *Miller-Jenkins II*, the Virginia Supreme Court, invoking the state law doctrine of law of the case, refused to allow Lisa to re-litigate those issues in a collateral appeal on the separate but related issue of enforcement. Because there is no federal question for this Court to review, the Petition should be dismissed.

A. This Court Does Not Have Jurisdiction to Review Cases Decided by State Courts on State Grounds.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Review is precluded "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman* noted the Court's history of respecting the rules of lower federal courts and stated plainly, "No less respect should be given to state rules of procedure." *Id.* at 751. *Coleman* reflected this Court's longstanding respect for the right of state courts to set forth and enforce their appellate procedural rules:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan v. Bransford*, 139 U.S. 197, 11 S.Ct. 519, 35 L.Ed. 144; *Brown v. Commonwealth of Massachusetts*, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 546; *Jacobi v. State of Alabama*, 187 U.S. 133, 23 S.Ct. 48, 47 L.Ed. 106; *Hulbert v. City of Chicago*, 202 U.S.

> 275, 281, 26 S.Ct. 617, 618, 50 L.Ed. 1026; *Newman v. Gates*, 204 U.S. 89, 27 S.Ct. 220, 51 L.Ed. 385; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U.S. 191, 195, 29 S.Ct. 546, 548, 53 L.Ed. 963.' *John v. Paullin*, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L.Ed. 381.

Wolfe v. North Carolina, 364 U.S. 177, 195 (1960).

The rule that this Court may not review state judgments decided on an independent state ground is based in the limitation of the Court's jurisdiction to "cases and controversies." U.S. Const. art. III § 2:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). That is precisely what would happen should this Court review the present case. Lisa's failure to appeal *Miller-Jenkins I* properly rendered that decision final. While this Court theoretically could determine that *Miller-Jenkins I* was incorrectly decided, the law of the case ruling in *Miller-Jenkins II* presupposes that the initial decision could be incorrect but holds that the initial decision is nonetheless binding as a matter of Virginia procedural

law. 276 Va. at 26, 661 S.E.2d at 826, App. 8a ("[N]othing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either.") (quoting *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 620, 93 S.E. 684, 687 (1917)). Nothing this Court could say about the federal law would change the judgment of the Virginia Supreme Court from which Petitioner seeks review.

B. State Court Judgments Based on Law of the Case Are Not an Exception to the "Adequate and Independent State Ground" Rule.

Petitioner urges this Court to accept this case for review by arguing that this Court not respect the straightforward ruling of the Virginia Supreme Court that Petitioner, by losing her substantive arguments in *Miller-Jenkins I* and failing to appeal that decision properly, was barred from raising the same arguments again in her ongoing custody battle with Respondent. The Virginia Supreme Court's "law of the case" ruling constitutes an adequate and independent state ground for the judgment precluding certiorari. This Court's precedents reflect respect for a state rule holding that a litigant who fails to follow state procedural rules in appealing final judgments are precluded from raising the same issues in a subsequent proceeding.

Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44 (1915) illustrates the point. That case concerned an action to quiet title to a strip of land that the plaintiff claimed for use as a railroad pursuant to federal law. The trial court ruled in favor of the defendant, and the

plaintiff appealed. The state supreme court reversed, and directed the trial court to enter a judgment awarding the plaintiff a right of way over the disputed land. The trial court did so, but the plaintiff appealed again, "insisting that it was only adjudged to be the owner of a right of way when, according to the true effect of the right-of-way act, it had a title in fee simple. . . ." 239 U.S. at 46. The state supreme court rejected this argument based on the law of the case doctrine:

> If counsel for appellant thought that this court, in the prior opinion, did not correctly define and determine the extent of appellant's rights to the land in dispute, or did not fully safeguard its rights as defined and adjudged, they should have filed a petition for a rehearing. This they did not do. The conclusions of law and judgment having been drawn and entered in conformity with the decision of this court, we are precluded from further considering the case. The former decision became, and is, the law of the case, and this court, as well as the litigants, are bound thereby.

Id.

This Court refused to accept the case for review. "Manifestly the first judgment was final," in that it "disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court." *Id.* at 47. "And as the question sought to be presented arises upon the

first judgment . . . , it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here." *Id.*

This case is no different from *Rio Grande Railway*. The issues sought to be reviewed here were finally adjudicated in *Miller-Jenkins I*. The Court of Appeals decision – which was not appealed in accordance with Virginia procedure – held that Vermont had jurisdiction over the matter, and remanded "with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court." 49 Va. App. at 103, 637 S.E.2d at 338, App. 47a. There was nothing left for the trial court to do but follow those instructions. Accordingly, the Virginia Court of Appeals and Supreme Court declined to allow Lisa to re-litigate the merits on the separate appeal dealing solely with the trial court's refusal to register a Vermont order, and this Court should do so as well.

The cases cited in Lisa's Petition are not to the contrary. Several of those cases deal with appeals to this Court from *federal* courts of appeal. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988); *Messinger v. Anderson*, 225 U.S. 436 (1912). These cases obviously have no bearing on whether a ruling based on law of the case represents an adequate and independent *state* ground barring review from a *state* court judgment.

The remaining cases cited in the Petition simply support the proposition that a "law of the case" ruling does not automatically preclude this Court's review, because in some "law of the case" rulings, preclusive

effect is given to an initial ruling that is not final and appealable to this Court. For example, *Washington ex rel. Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917), involved a condemnation action in which the defendant took an interlocutory appeal to the state supreme court to challenge the constitutionality of the state condemnation statute. The state supreme court upheld the statute, and remanded to the trial court for further proceedings. This Court refused to accept the case for review because the state court judgment was not final, but noted that the case could be brought before it again after the conclusion of state court proceedings:

> When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the supreme court as laying down the law of the case, this court will not be thus bound.

243 U.S. at 256-57. Similarly, in the other two cases cited in the Petition, this Court was not bound by a state supreme court's law of the case holding because the earlier state case that had decided the issue on review was a non-final decision, which was not immediately appealable to this Court. *See Reece v. Georgia*, 350 U.S. 85 (1955); *Davis v. O'Hara*, 266 U.S. 314 (1924). Thus, the Court's assumption of jurisdiction in these cases was based on the common sense recognition that "[b]ecause

we cannot review a state court judgment until it is final, a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982). That concern has no relevance to this case or to cases, like *Rio Grande Railway*, in which a party attempts to re-litigate an issue that has already been subject to a final judgment on the merits.[3]

The Court explained this crucial distinction in *Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432 (1923). In that case, the trial court granted a preliminary injunction to the plaintiffs, which was affirmed by the state supreme court on interlocutory appeal. On remand, a trial was held, and the plaintiffs prevailed on the merits. On appeal, the state supreme court held that its previous ruling on a particular issue was the law of the case, and could not be revisited. The defendants then sought review from this Court. The plaintiffs, citing *Rio Grande Railway*, argued that this Court was precluded from considering the case. But the Court distinguished *Rio Grande Ry.* on the basis that

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[3] Under Virginia law, a ruling can be given preclusive effect under the law of the case doctrine whether that ruling is a final judgment or not. *See Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S.E. 684, 687 (1917) (Law of the case "differs from res judicata, in that the conclusiveness of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final."). Here, of course, the ruling of the Court of Appeals in *Miller-Jenkins I* was final and subject to appeal to the Virginia Supreme Court, and this Court, had Lisa followed proper procedures.

the first state supreme court case was a final adjudication:

> [In *Rio Grande Railway*, t]his court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a final decree, and it was upon this decree that the second writ of error was brought.

262 U.S. at 436-37.

In the present case, as in *Rio Grande Railway*, the first Virginia Court of Appeals decision was the final adjudication of the issues now raised in Lisa's Petition. Lisa failed properly to appeal that ruling, and was therefore precluded from seeking review from this Court. Like the state supreme court in *Rio Grande Railway*, the Virginia Court of Appeals and Virginia Supreme Court held, on state law grounds, that she could not raise the same issues in a subsequent proceeding. This Court accordingly does not have jurisdiction over this case.

C. Lisa's Contention That the Virginia Supreme Court's Law of the Case Doctrine Is Not an Adequate State Ground Because It Is Not "Strictly or Regularly Followed" Is Without Merit.

Petitioner argues that the Virginia Supreme Court's ruling in *Miller-Jenkins II* was too novel to constitute an adequate state procedural ground, because the law of the case principle was not "strictly or regularly followed." See Petition For Writ of Certiorari at 35, citing *Hathorn supra*, 457 U.S. at 263. Contrary to Petitioner's assertion, however, the law of the case doctrine is firmly established in the Virginia courts. *See Chappell v. White*, 184 Va. 810, 816, 36 S.E.2d 524, 527 (1946) ("The [law of the case] doctrine has been applied in many cases by this court.... The principle here laid down is everywhere applied."); *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000) (it is "the established rule of appellate procedure in this Commonwealth that if a matter is appealed and a party fails to preserve a challenge to an alleged error" it becomes law of the case); *Searles' Adm'r v. Gordon's Adm'r*, 156 Va. 289, 295, 157 S.E. 759, 761 (1931) ("The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.") (citation omitted).

Nor is there anything novel about the way the doctrine was applied in this case. The Virginia Supreme Court explained that "[p]ursuant to the 'law of the case' doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that

decision during later stages of the 'same *litigation*.'" 276 Va. at 26-27, 661 S.E.2d at 826, App. 8a-9a (emphasis added) (*quoting Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181, 188 (2006). The court noted that "Lisa's petition and brief filed in this Court contain the identical assignments of error that she presented in her petition to this Court in the first Virginia appeal," 276 Va. at 27, 661 S.E.2d at 827, App. 10a, and concluded that "each of the issues Lisa raises in this appeal was addressed and resolved in the first Virginia appeal." 276 Va. at 27, 661 S.E.2d at 827, App. 11a. Regarding Lisa's contention that the second appeal was not part of the same "case" as the first one, the court explained:

> Although Lisa and Janet separately filed the cases from which the two appeals arose, both cases involved these same parties and sought adjudication of the same issue, custody and visitation regarding IMJ. The two Virginia appeals were part of the "same litigation" seeking to resolve the single question which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute.

276 Va. at 28, 661 S.E.2d at 827, App. 12a.

Petitioner's challenge to the Virginia Supreme Court's "newly-minted 'law of the cases' doctrine" rests entirely on what label that court employed, rather than the substance of the longstanding procedural rule that was honored. See Cert. Pet. at 35 Petitioner argues that the "law of the case" doctrine can never be applied to separately-captioned matters, even if the parties and

issues are identical. *Id.*[4] However, Petitioner does not challenge the basic principle of issue preclusion applied in *Miller-Jenkins II*, that a party that loses an appeal that is rendered final by procedural default is precluded from raising those issues in that or any subsequent proceeding between the same parties. What Lisa quibbles about is whether the use of the "law of the case" label is appropriate where there are two simultaneous separately-captioned proceedings involving the same parties and issues. The Virginia Supreme Court viewed these proceedings as essentially the "same litigation," a term the Court had used previously, rendering the "law of the case" doctrine applicable. 276 Va. at 26-27, 661 S.E.2d at 826, App. 8a-9a. Of course, had the Virginia Supreme Court viewed the two cases as not part of the same litigation, it could have held Lisa's claims in the second appeal barred by res judicata. *See Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 310, 367 S.E.2d 493 (1998) (holding second case barred by res judicata; "A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies."); *see also Bill Greever Corp. v. Tazewell Nat. Bank*, 256 Va. 250, 254, 504 S.E.2d 854 (1998) ("Judicially created doctrine of res judicata rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment

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[4] There are two proceedings because Lisa was required to file her parentage action (*Miller-Jenkins I*) in circuit court, while Janet was required to seek registration and enforcement of Vermont orders relating to custody and visitation, in the juvenile and domestic relations court (from which an appeal lies in the circuit court). See Va. Code Ann. § 20-146.26.

of parties.") (citation omitted); *see generally Steinman*, 121 Va. at 687 (the law of the case doctrine is "[c]losely akin to the doctrine of res judicata" and "it is at times confused with" res judicata). *Miller-Jenkins II*'s unremarkable application of issue preclusion principles is well-supported in Virginia law, and Petitioner "has failed to substantiate any claim that the [Virginia] courts in general apply this [rule] in an irregular, arbitrary, or inconsistent manner." *See Jimmy Swaggart Ministries v. Bd of Equalization of Cal.*, 493 U.S. 378, 399 (1990).

It bears emphasis that Petitioner had a more than adequate chance to seek review of these issues before this Court. Had she simply filed a notice of appeal from the Court of Appeals decision in *Miller-Jenkins I*, the Virginia Supreme Court could have ruled on the application of the PKPA and DOMA to this case. Because she failed to do so, the Virginia Supreme Court dismissed her appeal and later held that Petitioner could not relitigate the arguments in *Miller-Jenkins I*. Indisputably, that procedural default constituted an adequate and independent state law ground that barred a petition for certiorari from this Court. It cannot be the case that Petitioner can now get a second bite at the apple by spuriously attempting to re-litigate those issues, after final judgment on the merits had been reached, in a collateral enforcement proceeding.

II. Because Vermont and Virginia Have Reached the Same Decision, There Is No Compelling Reason To Grant Certiorari.

Because the procedural default below is jurisdictional, an evaluation of the merits of Lisa's position is unnecessary. Nevertheless, assuming *arguendo* that the case had not been decided on an independent and adequate state procedural ground, the Petition should also be denied because Lisa has failed to present any "compelling reason" warranting a grant of certiorari. *See* U.S. Sup. Ct. R. 10.

Both the Supreme Court of Vermont and the Court of Appeals of Virginia have unanimously rejected Petitioner's arguments, correctly holding that the PKPA governed the dispute and mandated that Vermont, where Lisa initially filed her custody action, retained jurisdiction despite Lisa's later efforts to change strategy and file in Virginia. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 958-59; *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. at 98, 637 S.E.2d at 335, App. 39a.

Both the Supreme Court of Vermont and the Court of Appeals of Virginia applied the straightforward jurisdictional provisions of the PKPA and reached the same decision: Vermont has jurisdiction.[5] Given that both

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[5] Certiorari is even less appropriate when one considers that the rulings in Vermont and Virginia that the PKPA applied irrespective of any argument about contrary public policy of the forum state are supported by all relevant prior case law. *Perez v. Tanner*, 332 Ark. 356, 367, 965 S.W.2d 90, 94-95 (1998); *In re Clausen*, 442 Mich. 648, 669, 502 N.W.2d 649, 657 (1993).

courts reached the same result, this case is directly opposite to the situation presented where state courts of last resort reach conflicting decisions on an important federal question, as contemplated by U.S. Sup. Ct. R. 10(b).

Additionally, even a cursory reading of the questions that Lisa presents to this Court for review demonstrates that the Petition is not worthy of being granted. Lisa presents both highly misleading and irrelevant contentions as part of her attempt to argue issues that are not actually presented by the Virginia proceedings:

- Lisa repeatedly intimates that Janet's parental rights "arose" or were "arising" out of the civil union. *See* Questions 1, 2. However, the Vermont Supreme Court was explicit that it was not recognizing Janet's parental rights based solely on the civil union and, in fact, that "[***m**]**any factors** . . . present here . . . support a conclusion that Janet is a parent." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) (emphasis added);[6] *see also*

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[6] The court explained that among the factors demonstrating Janet's parenthood

> "are that . . . [i]t was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent

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id. at 971 ("Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case.").

- In an attempt to bolster the supposed relevance of DOMA, Lisa maintains that DOMA was enacted after the PKPA. *See* Question 1. Lisa neglects to mention that the PKPA was amended ***after*** DOMA specifically to clarify the PKPA's applicability to visitation orders, which is what is at issue in this case. *See* Pub. Law 104-199 (DOMA) (1996) and Public Law No. 105-374 (1998) (adding language in section 1 explicitly providing that the PKPA covers initial visitation determinations); *Bruner v. Tadlock*, 338 Ark. 34, 39-40, 991 S.W.2d 600, 603 (1999) (The purpose of Public Law 105-374 was to "mak[e] explicit" the commands of the PKPA with respect to visitation orders and "hopefully [] eliminate the hassles, obstacles, and delays that too often confront those who have valid visitation

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(Cont'd)

during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition."

Miller-Jenkins, 912 A.2d at 970.

orders and are asking only that federal law be followed," citing 144 CONG. REC. 151, S12941 (daily ed. Oct. 21, 1998).)

- In a further attempt to suggest that this case implicates DOMA, Lisa argues that that law applies to her civil union with Janet, even though a Vermont civil union is not "treated as a marriage," 28 U.S.C. § 1738C, as even Lisa admits with respect to matters such as the application of Vermont's marriage evasion statute. *See* Questions 1, 2 and Petition for Certiorari, p. 26, n. 11.[7]

- Lisa attempts to resurrect her claims that the **Vermont** ruling violates her constitutional rights as a parent. *See* Questions 3, 4. Of course, Lisa was obligated to – and already did – raise that issue in her certiorari petition from the Vermont Supreme Court's ruling, which this Court denied.

- Lisa characterizes Janet as a "legal stranger" to the child, when that is

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[7] Prior case law agrees that legal relationships other than marriages are not covered by DOMA. *Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp.2d 1239, 1247-48 (N.D. Okla. 2006) ("Vermont civil union is not 'treated as a marriage' under Vermont law, as that term was meant to be understood when Congress passed DOMA."); *Smelt v. County of Orange*, 447 F.3d 673, 683 and n.26 (9th Cir. 2006) (a California domestic partnership was "not by any means a marriage.").

precisely the opposite of what the Vermont Supreme Court held. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d at 970. *See* Question 3.

Consequently, having failed to present any compelling reason for a writ of certiorari to be granted, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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